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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,

Appellant,

v.

J.A. CROSON COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE MARYLAND LEGISLATIVE BLACK CAUCUS AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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QUESTION PRESENTED

Whether the Equal Protection Clause compels a City Council or any state or local legislative body to admit it actually discriminated and compile findings in support of that admission as a predicate to enacting race conscious remedial legislation.

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United States v. Wood, Wire & Metal Lathers Int'l Union, Local Union No. 46, 471 F.2d 408 (2nd Cir.), *cert. denied*, 412 U.S. 939 (1973)	18
United Steelworkers of America v. Weber, 443 U.S. 193 (1979)	*passim*
Valentine v. Smith, 654 F.2d 503 (8th Cir. 1981)	16
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Wygant v. Jackson Board of Education, —— U.S. ——, 106 S. Ct. 1842 (1986)	*passim*

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A. Bickel, *The Least Dangerous Branch* (1962) 26
Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U. Pa. L. Rev. 637 (1966) 8, 26
Coleman, EQUALITY-NOT YET, N.Y. Times (July 13, 1981) 9

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Comment, *Minority Construction Contracts*, 12 Harv. C.R.—C.L.L. Rev. 693 (1977) 3

Comment, *Reverse Discrimination: The Supreme Court Defines a Significant Limitation on the Permissible Use of Race in Affirmative Action*, 26 Washburn L. J. 618 (1987) 18

Comment, *The Constitutionality of Affirmative Action in Public Employment: Judicial Deference to Certain Politically Responsible Bodies*, 67 Va. L. Rev. 1235 (1981) 14, 23

Controller General, *Minority Firms on Local Public Works Project—Mixed Results* (1979)..... 3

Cox, *The Supreme Court, 1965 Term—Forward: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91 (1966).. 26

Days, *Fullilove*, 96 Yale L. J. 453 (1987) 20

EDA, U.S. Dept. of Commerce, *Local Public Works Program Interim Report: Fostering the Development and Exp nsion of Minority Firms in Construction and Related Industries* (Sept. 1978) 4

Fisher, *Constitutional Interpretation By Members of Congress*, 63 N.C.L. Rev. 707 (1985) 27

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Karst, *Legislative Facts in Constitutional Litigation*, Supreme Court Review 75 (1966) 28

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L. Hand, *The Bill of Rights* (1958)	26
Larson, *Race Consciousness in Employment After Bakke*, 14 Harv. C.R.—C.L.L. Rev. 215 (1979)	18
Levinson, *A Study of Preferential Treatment: The Evolution of Minority Business Enterprise Assistance Programs*, 49 Geo. Wash. L. Rev. 61 (1980)	3
Memorandum of Office of Audits and Investigations, Prince George's County, Maryland, *Minority Contracting* (Nov. 9, 1987)	5
Notes, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 Yale L. J. 1403 (1982)	23
Office of Legislative Oversight, Montgomery County, Maryland, *A Description and Evaluation of the County and Bi-County Minority Procurement Utilization Programs* (R. No. 88-1)—(1988)	5
Oversight Hearings on Small Business Administration Programs and Activities Before the Subcommittee on SBA Oversight and Minority Enterprises of the House Committee on Small Business, 94 Cong., 1st Sess. (1976)	5
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BRIEF OF THE MARYLAND LEGISLATIVE BLACK CAUCUS AS AMICUS CURIAE IN SUPPORT OF APPELLANT

CONSENT OF THE PARTIES

Petitioners and Respondents have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE MARYLAND LEGISLATIVE BLACK CAUCUS

The Maryland Legislative Black Caucus ("MLBC" or "Amici") is a non-profit corporation organized under the laws of the State of Maryland. Its membership is comprised of the elected Black senators and delegates of the Maryland Legislative Assembly, and are as follows: Senator Decatur Trotter, Chairman, Prince George's County; Senator Clarence W. Blount, Baltimore City; Senator Nathan C. Irby, Jr., Baltimore City; Senator Troy F. Brailey, Baltimore City; Senator Albert R. Wynn, Prince

George's County; Senator Larry Young, Baltimore City; Delegate Elijah E. Cummings, Baltimore City; Delegate Ruth N. Kirk, Baltimore City; Delegate Tony Fulton, Baltimore City; Delegate Ralph M. Hughes, Baltimore City; Delegate Howard P. Rawlings, Baltimore City; Delegate Margaret H. Murphy, Baltimore City; Delegate Nathaniel T. Oaks, Baltimore City; Delegate Frank Boston, Baltimore City; Delegate Curtis S. Anderson, Baltimore City; Delegate Kenneth C. Montague, Jr., Baltimore City; Delegate Hattie N. Harrison, Baltimore City; Delegate Clarence Davis, Baltimore City; Delegate John W. Douglass, Baltimore City; Delegate Richard N. Dixon, Baltimore and Carroll Counties; Delegate Nathaniel Exum, Prince George's County; Delegate Sylvania W. Woods, Jr., Prince George's County; Delegate Ulysses Currie, Prince George's County; Delegate Juanita Miller, Prince George's County; Delegate Christine M. Jones, Prince George's County; Delegate Gloria Lawlah, Prince George's County; and Delegate John Jefferies, Baltimore City. MLBC was organized with the principle concern of legislatively protecting the civil rights of Maryland's Black citizens and eliminating discrimination throughout state and local government.

The MLBC is extremely concerned about the issues presented by this appeal because both the Fourteenth Amendment to the U.S. Constitution and the Maryland Constitution charge the State of Maryland with the duty to enforce the protections guaranteed by that amendment. Indeed, the resolution of these issues will have a direct bearing on whether the State of Maryland, its localities, and municipalities may voluntarily adopt remedial legislation aimed at eliminating the tragic legacy of racial discrimination.[1] Moreover, in the view of the MLBC,

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[1] See, e.g., Md. Code, State Finance and Procurement Article, Sec. 11-148(b).

set-aside legislation [2] such as that adopted by the City of Richmond provides one of the most constructive and effective means for minority businesses to establish their presence in the mainstream of American economic life.[3]

Figures revealing the lack of Black participation within the construction industry in Richmond, or, for that matter, the State of Maryland, cry out for assistance of the type provided by set-aside programs.[4] One of the primary

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[2] A "set-aside" program can require a majority prime contractor to award a certain percentage of his subcontracts or the total value of the contract to minority business. *See, e.g., J. A. Croson v. City of Richmond*, 822 F.2d 1355, 1356 (4th Cir. 1987). Another type of set-aside would reserve a certain percentage of public contracts to be bid on by minority businesses only. *See, e.g., Ohio Contractors Ass'n v. Keip*, 713 F.2d 167, 168-169 (6th Cir. 1983). At least one federal court has seen no constitutional or operational difference between the former program, which is similar to that upheld by the U.S. Supreme Court in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and the latter, which is more akin to a "sheltered market" program. *See, Ohio Contr. Assoc., supra*, 713 F.2d at 173. District of Columbia minority contracting law defines "sheltered market" as "a process whereby contracts or subcontracts are designated, before solicitation of bids, for limited competition from minority business enterprises on either a negotiated or competitive bid process." D.C. Code, Section 1-1142(8). For other types of set-aside programs. See, *South Florida Chapter of Associated General Contractors of America, Inc. v. Metropolitan Dade County*, 723 F.2d 846 (11th Cir.), *cert. denied*, 469 U.S. 871 (1984); *Southwest Washington Chapter National Electrical Contractors Ass'n v. Pierce County*, 100 Wash.2d 109, 667 P.2d 1092 (Wash. 1983).

[3] Levinson, *A Study of Preferential Treatment: The Evolution of Minority Business Enterprise Assistance Programs*, 49 Geo. Wash. L. Rev. 61 (1980); and Controller General, *Minority Firms on Local Public Works Project—Mixed Results*, p. 9 (1979).

[4] See, Comment, *Minority Construction Contracts*, 12 Harv. C.R.-C.L.L. Rev. 693 n.3 (1977). ("Although discrimination against minority construction firms is difficult to document statistically, a number of studies have confirmed the existence of such discrimination. See, e.g., R. Clover, *Fostering Minority Enterprise in Construction* (April 1975) (Report for the Center for the Study of Human Resources, University of Texas, at Austin, on file with the

reasons for set-aside programs was best stated in a Department of Commerce report, which states:

> The purpose of [the Set-Aside] requirement, which was introduced by Congressman Parren Mitchell of Maryland, was to help eliminate discrimination in construction and related industries and to bring minority firms into the mainstream of those industries. The extent to which minority firms have been excluded from these industries in the past is illustrated by data from the 1972 Census of Construction Industries and the 1972 Survey of Minority-Owned Businesses. These reports reveal that minorities owned only 4.3 percent of the construction firms in operation in 1972. Furthermore, minorities received only one percent of the $164.5 billion earned by all construction firms in 1972. The figures are similar with respect to those industries that provide supplies and equipment for construction firms. Minority firms represented only 1.9 percent of the total number of establisments in the wholesale trade industry in 1972 and received only 0.3 percent of the gross receipts. Minority firms' participation in Federal construction procurement in 1977 was also disproportionately low, with such enterprises performing only 1.2 percent of Federal contracts. In addition, minority and female-owned firms received less than seven tenths of one percent of all contracting dollars spent by those state and local governments that responded to a 1973 U.S. Civil Rights Commission survey.[5]

Although the case before this Court does not directly address a state's authority to voluntarily remedy race

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Harvard Civil Rights-Civil Liberties Law Review); S. Taylor, *Catching Up: A Study of Behavior and Experiences of Minority Construction Contractors in Nine American Cities* (May 1973) (Report for the Charles F. Kettering Foundation, on file with the Harvard Civil Rights-Civil Liberties Law Review)").

[5] EDA, U.S. Dept. of Commerce, Local Public Works Program Interim Report: *Fostering the Development and Expansion of Minority Firms in Construction and Related Industries*, at 1 (Sept. 1978).

discrimination, how the Court decides this case will undoubtedly have an impact on the ability of the Maryland Legislative Assembly, or any state or local legislative body, to eradicate racial discrimination. It is for this and two other reasons that Amici seek to participate in this case.

First, Amici recognize from personal experience as legislators the need for clearly defined remedial measures to combat racial discrimination. The MLBC has sought to enact race conscious remedies at both the state and local level, but its efforts have been stifled by the lack of clarity from this Court. While some governmental bodies prefer voluntary (non-statutory) set-aside programs, such measures have repeatedly fallen short of their goals.[6] In contrast, mandatory set-aside legislation that compels such action produces substantial results and propels minority enterprises toward the economic mainstream.[7]

Second, the MLBC believes that the elimination of racial discrimination is of paramount importance to the State

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[6] See Memorandum of Office of Audits and Investigations, Prince George's County, Maryland, *Minority Contracting*, dated November 9, 1987; Office of Legislative Oversight, Montgomery County, Maryland, *A Description and Evaluation of the County and Bi-County Minority Procurement Utilization Programs* (R. No. 88-1) (1988); *Hearing on the Small Business Administration Sec. 8(a) Contract Procurement Program Before the Senate Committee on Small Business*, 94th Cong., 2d Sess. (1976); *Hearings on SBIC and SBLC Programs and Selected SBA Activities Before the Subcommittee on SBA Oversight and Minority Enterprises of the House Committee on Small Business*, 94th Cong., 1st Sess. (1976); *Oversight Hearings on Small Business Administration Programs and Activities Before the Subcommittee on SBA Oversight and Minority Enterprises of the House Committee on Small Business*, 94th Cong., 1st Sess. (1976); and *Hearings on Procurement Assistance Programs of the Small Business Administration Before the Senate Committee on Small Business*, 94th Cong., 1st Sess. (1975).

[7] See n.3, *supra*.

of Maryland as well as to society at large. To achieve this objective, state and local legislatures must have at their disposal a full range of race conscious remedies. The MLBC believes that if the Fourth Circuit's decision is allowed to stand, it would severely restrict the attempts of state and local legislatures to eradicate the lingering effects of prior discrimination. See e.g. *Michigan Road Builders Ass'n., Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987); *Assoc. Gen. Contr. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987) *rehearing denied*; *J. Edinger & Son v. City of Louisville*, 802 F.2d 213 (6th Cir. 1986). But see *H. K. Porter Co., Inc. v. Metropolitan Dade County*, 825 F.2d 324 (11th Cir. 1987).

Thus, the perspective which Amici intend to convey to this Court is that of a legislative body which is constitutionally charged with the responsibility of enforcing the Fourteenth Amendment through legislation.[8]

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[8] This Court has, in the past, recognized a constitutional *duty* on the part of the individual state governments, under whose authority the local governments act, to ". . . take *affirmative* steps to eliminate the continuing effects of past unconstitutional discrimination." *Wygant v. Jackson Board of Education*, —— U.S. ——, ——, 106 S. Ct. 1842, 1856 (1986) (emphasis added) (O'Connor, J., concurring in part and concurring in the judgment) citing as examples, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971); and *Green v. New Kent County School Board*, 391 U.S. 430, 437-38 (1968). For a view of how this recognition specifically affects Amici, see Maryland Constitution, Declaration of Rights, art. 24 (Equal Protection); see also *Hornbeck v. Somerset County Board of Education*, 295 Md. 597, 458 A.2d 758 (1983) (held that the Equal Protection Clause of the Fourteenth Amendment and equal treatment guaranteed by article 24 of the Maryland Constitution's Declaration of Rights were *in pari materia* and would most often be applied to the same extent); *State v. Good Samaritan Hospital*, 299 Md. 310, 473 A.2d 892, appeal dismissed, 469 U.S. 802 (1984) (equal protection embodied by article 24); and *Lawrence v. State*, 51 Md. App. 575, 444 A.2d 478 (1982), aff'd, 295 Md. 557, 457 A.2d 1127 (1983) (U.S. Supreme Court's interpretations of the Fourteenth Amendment act as authority for interpretation of article 24 of the Maryland Constitution).

STATEMENT OF THE CASE

Amicus curiae adopts the facts as presented in the Brief for the City of Richmond as well as its Statement of the Case.

SUMMARY OF ARGUMENT

For over thirty years since *Brown v. Board of Education*, 347 U.S. 483 (1954), this nation has chartered a direct course toward eradicating the vestiges of racial discrimination from every aspect of public and private life. In achieving this objective, this Court has consistently supported the concept that both public and private institutions should voluntarily seek to eliminate the effects of discrimination. And, while this Court has not spoken with a single voice as to what level of scrutiny should be applied to analyze the use of race conscious remedies, one thing is certain: racial equality should be facilitated in the least abrasive manner possible.

Recognizing the development of this fundamental national policy, the Fourth Circuit's decision erects a barrier that frustrates more than facilitates the achievement of racial equality. In effect, the court of appeals' decision extends the mandate of the Fourteenth Amendment and *Wygant* far beyond what this Court has actually required of a legislative body by holding that the constitutionality of a race conscious remedy turns on an admission of prior discrimination by the governmental body itself and the volume and specificity of those findings which support that admission. Neither the Constitution nor *Wygant* require a state or local legislature to admit that it has actually discriminated against minorities. Moreover, allowing the court of appeals' decision to stand will no doubt have a chilling effect upon the voluntary efforts of public and private institutions to eliminate racial discrimination within and without their spheres of influence.

When the court below reached its decision, it failed not only to consider the principles that were established in *Fullilove*, and later reiterated in *Johnson v. Transportation Agency, Santa Clara County, California*, —— U.S. ——, 107 S. Ct. 1442 (1987) but, also, to recognize the distinguishing characteristics of the legislative fact-finding process. See, e.g., Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U. of Pa. L. Rev. 637, 640 (1966). As a result, the court of appeals was unable to discern the factual and institutional distinctions between the findings involved in *Wygant* and those of the Richmond City Council.

Finally, by requiring a legislative body to make findings of its own acts of discrimination the court below imposed on legislatures a findings requirement similar to that of a judicial or administrative body. By elevating legislative findings to such standards the decision unnecessarily results in an intrusion by the judiciary into the legislative process, thereby upsetting the balance of governmental powers in our nation. Such imposition presents a clear threat to the legislative process that this Court has on numerous occasions fought to prevent.

If the decision below is allowed to stand it would not only impede the achievement of an important public policy, that is, the elimination of racial discrimination, but would also begin to erode accepted separation of powers principles.

ARGUMENT

In a color-blind society, a "race conscious remedy" would have no application or meaning. See e.g., *Charlotte-Mecklenburg, supra*, 402 U.S. at 1, 28. Unfortunately, America's past has exemplified anything but a color-blind society.[9] *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857); *Plessy v. Ferguson*, 163 U.S. 537, 559-60 (1896) (Harlan J., dissenting). "For black Americans, racial equality is a tradition without a past." Coleman, EQUALITY—NOT YET, N. Y. Times, July 13, 1981, at A15, Col.2. For over thirty years, since *Brown v. Board of Education, supra*, this Court, the Congress, the President, and the various branches of state and local governments have struggled to make racial equality a tradition.[10] The experience has not been without pain

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[9] See also U.S. Const. art. I, Sec. 2, cl. 3 (slaves relegated to status of three-fifths of a free human being); art. I, Sec. 9, cl. 1 (slavery not to be prohibited by Congressional act before 1808); art. IV, Sec. 22, cl. 3 (runaway slaves to be returned to state of slavery); Amendment XIII (1865) (slavery abolished, fifty-seven years after art. I, Sec. 9, cl. 3 made it possible); Amendment XIV (1868). (Due Process and Equal Protection clauses established with "one pervading purpose," that being ". . . the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him." *Butchers' Benevolent Ass'n v. Crescent City Livestock Landing & Slaughterhouse Co.* (The Slaughterhouse Cases), 16 U.S. (Wall.) 36, 71 (1873); Amendment XV (1870) (guaranteeing that disenfranchised Blacks not be denied the right to vote based upon "race, color, or previous condition of servitude); and Amendment XXIV (1964) (poll taxes abolished to ensure that disenfranchised Blacks not be denied the right to vote).

[10] See, e.g., Judicial Branch: *U.S. v. Paradise*, —— U.S. ——, 107 S. Ct. 1053 (1987); Executive Branch: Executive Orders 11246 (1965), 11375 (1967), 11518 (1970), 11625 (1971); Legislative Branch: Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000d *et seq.* (1976); Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e *et seq.* (1976); and State

and conflict. The Fourth Circuit's decision in *Croson* is no exception.

Instead of translating racial equality into a national policy in the least abrasive manner possible, the court below frustrates the process by creating tension between the legislative and judicial branches of government. The court of appeals accomplishes this obstruction by imposing more stringent fact-finding requirements on a legislative body than have ever been conceived by this Court. At the heart of the court of appeals analysis is a subliminal struggle to apply color-blind principles, despite this Court's previous holdings to the contrary.[11] The decision of the court below raises the very issue presented by all affirmative action cases, which is: how does our society reconcile the past with its egalitarian ideals.[12]

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and Local governments: *Ohio Contractors Ass'n, supra,* 713 F.2d 167 (1983), *Montgomery County v. Fields Road Corp.,* 282 Md. 575, 386 A.2d 344 (1978).

[11] See *Johnson, supra,* 107 S. Ct. at 1450 (Brennan, J., delivering the opinion of the Court) (restated prior findings of this Court in *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979), that taking race into account was consistent with Title VII's objective of "break[ing] down old patterns of racial segregation and hierarchy." Citing *Weber, supra,* 443 U.S. at 208); *Regents of the University of California v. Bakke,* 438 U.S. 265, 287 (1978) (". . . Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment"); *Charlotte-Mecklenburg, supra,* 402 U.S. at 28 (" 'Racially neutral' assignment plans . . . may (be inadequate) . . . to counteract the continuing effects of past school segregation . . ."); and, *North Carolina State Board of Education v. Swann,* 402 U.S. 43, 46 (1971) ("Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."). See also *Korematsu v. United States,* 323 U.S. 214, 216 (1944) and *Lee v. Washington,* 390 U.S. 333, 334 (1968) (Black, Harlan, Stewart, J.J., concurring).

[12] This Court has on numerous occasions held that in order to achieve true racial equality, racially neutral remedies would be inadequate. See e.g., *Green, supra, McDaniel v. Barresi,* 402 U.S. 39 (1971); and *Charlotte-Mecklenburg, supra,* 402 U.S. at 28.

I. THE CITY OF RICHMOND MINORITY BUSINESS UTILIZATION PLAN DOES NOT VIOLATE THE EQUAL PROTECTION CAUSE.

To quote a well known constitutional scholar, Professor Laurence Tribe: "Race conscious remedies are now an accepted part of Fifth and Fourteenth Amendment jurisprudence." Laurence H. Tribe, *Constitutional Choices* (1985). The acceptance of race conscious remedies for past racial discrimination does not, however, resolve the question of what level of scrutiny is required to test their constitutionality. *Local 28, Sheet Metal Workers' International Association v. EEOC*, —— U.S. ——, 106 S. Ct. 3019, 3052 (1986) (opinion of Brennan, J.) *Wygant, supra*, 106 S. Ct. at 1852 (O'Connor, J., concurring); *Id.*, at 1867 n.7 (Marshall, J., dissenting). The only analytical agreement among members of this Court is that, when addressing "suspect classifications" such as race, judicial review of a challenge brought under the Equal Protection Clause requires a two-pronged analysis and that some level of heightened scrutiny is appropriate.[13] *Id.*, at 1852.

The first prong requires an inquiry into the governmental interest being vindicated. Inclusive within the first prong is a determination of whether the governmental entity adopting the race conscious remedy is competent to make findings of racial discrimination to establish a sufficiently important or compelling governmental interest. See *Paradise, supra*, 107 S. Ct. at 1064 n.17; *Wygant, supra*, 106 S. Ct. at 1846 (plurality opinion);

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[13] Although Amici do not concede that affirmative action programs should be subjected to strict scrutiny, the Richmond Plan survives even the strictest scrutiny. See e.g., *Paradise, supra*, 107 S. Ct. at 1064 Sec. n.17 (1987) (plurality opinion); *Sheet Metal Workers, supra*, 106 S. Ct. at 3052-53 (plurality opinion); *Bakke, supra*, 438 U.S. at 357-63 (Brennan, J., concurring in part and dissenting in part). Amici submits, however, that the intermediate level of scrutiny, which was endorsed by several members of this Court in *Bakke* and subsequent cases, should apply to affirmative action programs.

Id., at 1853 (O'Connor, J. concurring); *Id.*, at 1861-62 (Marshall, J. dissenting) *Id.*, at 1867-68 (Stevens, J. dissenting); *Sheet Metal Workers, supra*, 106 S. Ct. at 3034, 3050 (pluarity opinion); and *Id.*, at 3055 (Powell, J. concurring).

The second prong of the equal protection analysis focuses on whether the means chosen are sufficiently related to effectuating the governmental interest. *Paradise, supra*, 107 S. Ct. at 1064 (plurality opinion); *Sheet Metal Workers, supra*, 106 S. Ct. at 3052-53 (plurality opinion). This Court has established that race conscious relief need not be limited to victims of prior discrimination, and that "innocent persons may be called upon to bear some of the burden of the remedy." *Wygant, supra*, 106 S. Ct. at 1853-54 (opinion of O'Connor, J); *Id.*, at 1863 (opinion of Marshall, J.); *Id.*, at 1867-68 (opinion of Stevens, J.); *Id.*, at 1850 (opinion of Powell, J.); see also *Sheet Metal Workers, supra*, 106 S. Ct. at 3052-53 (opinion of Brennan, J.); and *Id.*, at 3054-57 (opinion of Powell, J.). These few established principles in what has become a complex area of the law are now jeopardized by the Fourth Circuit's decision in this case.

The Fourth Circuit's interpretation of *Wygant* makes unreasonable demands of a state or local government seeking to eradicate prior racial discrimination. First, the court below would require a governmental body to specifically admit or concede that it had affirmatively engaged in discriminatory practices. This requirement has been specifically criticized by members of this Court in *Wygant* and other decisions.[14] *Wygant, supra*, 106 S. Ct.

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[14] In her separate opinion in *Wygant*, Justice O'Connor discussed the chilling effect that such a requirement would exert upon voluntary compliance by governmental bodies acting as public employers. To quote Justice O'Connor:

> . . . [A] requirement that public employers make findings that they have engaged in illegal discrimination . . . would severely

at 1855. The court of appeals' decision would have the practical effect of not only discouraging enforcement of the Fourteenth Amendment, but also severely curtailing the power of legislative bodies to combat racial discrimination since the legislative process is not particularly well suited for such individualized findings.[15] Second,

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> undermine public employers' incentive to meet voluntarily their civil rights obligations . . . .

Wygant, supra, 106 S. Ct. at 1855 (O'Connor, J., concurring in part and concurring in the judgment). See also n.20, *infra*. Justice O'Connor reaffirmed her position in a separate opinion to this Court's decision in *Johnson* when she stated in reference to affirmative action plans under a Title VII analysis, that:

> . . . neither *Wygant* nor *Weber* places a burden on employers to prove that they actually discriminated against women or minorities [before enacting a voluntary remedial plan].

and that

> . . . [Because] this Court has long emphasized the importance of voluntary efforts to eliminate discrimination . . . a contemporaneous finding of discrimination should not be required.

Johnson, supra, 107 S. Ct. at 1463 (O'Connor, J., concurring in the judgment). This recognition of the potentially stifling effect which such a strict requirement would have on voluntary remedial action by public bodies is also addressed in the context of school desegregation by other members of the Court in *Wygant* in the following manner:

> The real irony of the argument urging mandatory, formal findings of discrimination lies in its complete disregard for a longstanding goal of civil rights reform, that of integrating schools without taking every school system to court.

Wygant, supra, 106 S. Ct. at 1863 (Marshall, J., with whom Brennan and Blackmun, J. J., join dissenting). See also, e.g., *Johnson, supra*, 107 S. Ct. at 1451 n.8, and 1457; *Weber, supra*, 443 U.S. at 204; and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

[15] *Fullilove, supra*, 448 U.S. at 503 (Powell, J., concurring) (legislative bodies have a "broader mission to investigate and consider all facts and opinions that may be relevant . . ."). See also *Katzenbach v. Morgan*, 384 U.S. 641, 668-69 (1966) (Harlan, J., whom Stewart, J., joins, dissenting) (provides examples of the general

the Fourth Circuit further misapplied *Wygant* by holding that the Richmond Plan was not sufficiently "narrowly tailored" to meet its remedial goal.[16] If the court of appeals decision is allowed to stand it would so narrowly tailor race conscious remedies as to render such remedies ineffective, despite this nation's commitment to making racial equality a tradition.

As part of the legislative process, Amici believe that the Fourth Circuit's decision effected an unprecedented burden upon legislative bodies not contemplated by this Court in *Wygant* nor by the framers of the Fourteenth Amendment. Because of the unprecedented barriers to the implementation of affirmative action programs created by the court of appeals' decision, Amici will focus their attention on the first prong of the court of appeals' decision.[17]

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scope of legislative fact-finding); and Note, *The Constitutionality of Affirmative Action in Public Employment: Judicial Deference to Certain Politically Responsible Bodies*, 67 Va. L. Rev. 1235, 1240-41 (1986) (legislative body conducts fact-finding "subject to political constraints").

[16] In determining whether race conscious remedies are appropriately tailored, this Court has examined such factors as the necessity for relief, the flexibility and duration of the relief, the relationship of any numerical goals to the relevant labor market, and the impact on non-minorities. See, *Sheet Metal Workers, supra*, 106 S. Ct. at 3052-53 (opinion of Brennan, J.); *Id.*, at 3054-55 (opinion of Powell, J.); *Wygant, supra*, 106 S. Ct. at 1850-52 (opinion of Powell, J.); *Id.*, at 1857; *Id.*, at 1857-58 (White, J., concurring in judgment); *Id.*, at 1864-65 (Marshall, J., dissenting); *Id.*, at 1869-71 (Stevens, J., dissenting).

[17] Amici have chosen to focus on the Fourth Circuit's implementation of the first prong of its equal protection analysis because that use strikes at the very heart of the legislative process. Amici do not, however, concede the correctness of the court of appeals' usage as to the second prong of its equal protection analysis. Amici therefore defers to the views of the City of Richmond and other supportive amici, who more than adequately address the court of appeals' analysis of the second prong.

A. The Equal Protection Clause does not require a governmental unit that voluntarily seeks to eliminate the effects of racial discrimination to admit or concede it actually engaged in discriminatory practices.

The Fourth Circuit decision would essentially require every state or local legislative body to find that it had actually discriminated before implementing a race conscious remedy. The court of appeals' conclusion radically expands *Wygant* and the Fourteenth Amendment far beyond what this Court intended and is without precedent.

According to the Fourth Circuit's interpretation of this Court's decision in *Wygant*, before a governmental interest in a racial preference can be accepted as "compelling," "there must be findings of prior discrimination." *Croson, supra*, 822 F.2d at 1358. Moreover, these findings must be predicated on more than societal discrimination, instead they must concern prior discrimination "by the government unit involved." *Id.*, citing *Wygant, supra*, 106 S. Ct. at 1847. Against this background, the court of appeals found the Richmond City Council's findings seriously wanting and without foundation for establishing a compelling interest which would justify the use of racial classifications in its contracting program. The ruling by the court of appeals, however, totally ignores the principles established in *Fullilove*, which was decided by this Court prior to *Wygant, supra*.

The requirements of finding discrimination and the corresponding authority or competence to engage in such remedial action were first raised by Justice Powell in *Bakke*[18] and, later, more specifically addressed in *Fullilove*, when he said:

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[18] In *Bakke*, Justice Powell stated that a governmental race conscious remedy is only constitutional if a "competent" body makes sufficient "findings" of past discrimination justifying such program. He concluded that the Board of Regents of the University of California was not competent to address societal discrimination, nor

> . . . The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of a governmental body. 448 U.S. at 515-16 n.14.

Justice Powell declined to answer the question he posed in *Fullilove* as to what degree of factual specificity is required to justify the use of race conscious remedies. One court has noted that "there is no consensus on what findings of past discrimination justify remedial affirmative action." *Valentine v. Smith*, 654 F.2d 503, 509 (8th Cir. 1981). And, it was in this void that the court below sought to establish standards that exceeded those in both *Wygant* and *Fullilove*.[19] A close examination of past affirmative action cases and particularly *Fullilove* reveals, however, that the degree of findings necessary for a legislative body[20] to demonstrate a compelling government interest is not as rigorous as the court of appeals would have us accept.

In *Fullilove*, this Court ruled on the power of Congress to adopt a "Minority Business Enterprise" (MBE) pro-

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did it make adequately specific findings to support its affirmative action program. *Bakke, supra*, 438 U.S. at 307-10 (opinion of Powell, J.).

[19] The court of appeals cited *Valentine v. Smith, supra, Kromnick v. School Dist. of Philadelphia*, 739 F.2d 894 (3rd Cir. 1984), and *Metropolitan Dade County, supra* as examples of local governmental bodies making adequate findings of discrimination, thereby implying acceptance of the Richmond City Council's competence to make findings of discrimination.

[20] This Court has determined in *Fullilove, supra*, 448 U.S. at 478, that Congress has the competence to make such findings. In *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977), this Court determined that federal courts were also competent to make findings. In *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977); *McDaniel v. Barresi, supra*; and *Railway Mail Association v. Corsi*, 326 U.S. 88 (1945) this Court held that states are also competent. And, in *Metropolitan Dade County*, supra this Court signaled that local city or county councils are also competent to make findings of discrimination.

vision of the Public Works Employment Act of 1977.[21] That program was not unlike the Richmond Plan and others. In upholding the constitutionality of the MBE provision, this Court approved Congress' findings of past discrimination even though it had failed to make "specific factual findings" of statutory or constitutional violations. *Fullilove, supra,* 448 U.S. at 478. Indeed, the findings that Congress did make presented no clear and specific evidence of racial discrimination by the federal government in the disbursement of federal contracting funds. See, *Id.*, at 527 (Stewart J., dissenting). Interestingly, even Justice Powell implicitly ignored his own "specific findings" requirement by expressly adopting that portion of Chief Justice Burger's opinion that endorsed Congress' findings. *Id.*, at 453, 495.[22] Moreover, Justice Powell and Chief Justice Burger found that the low number of public contracts awarded minority businesses contained in the legislative history of the MBE provision, was sufficient to justify Congress' remedial action. *Id.*, at 456-67 (opinion of Burger, C. J.); *Id.*, at 502-06 (Powell, J., concurring). Implicit in this Court's *Fullilove* decision was the reestablishment of the principle that race conscious remedies need not be dependent on finding the government guilty of discrimination, but instead they must be directed at remedying the effects of discrimination within the particular governmental entity's sphere of influence. This principle, which was set forth in *Fullilove* is not foreign,[23] and it later resurfaced in *Johnson, supra.*

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[21] Pub. L. No. 95-28, 91 Stat. 116 (codified at 42 U.S.C. & 6705(f)(2) (Supp. III 1979).

[22] See also, *The Supreme Court Review,* 1979 Term—94 Harv. L. Rev. 75, 133 (1980).

[23] Even prior to *Bakke,* there were several instances of judicial approval of programs that used racial classifications to ameliorate perceived discrimination, although actual prior discrimination had not been judicially ascertained. Moreover, even consent decrees have been issued to authorize race conscious remedies prior to making specific findings of past discrimination. See e.g., *Califano v. Webster,* 430 U.S. 313 (1977); *Schlesinger v. Ballard,* 419 U.S. 498

In *Johnson*, this Court held that a public employer need not show that it had discriminated as a predicate to instituting a voluntary affirmative action plan when challenged under Title VII of the Civil Rights Act of 1964. *Johnson, supra*, 107 S. Ct. at 1451. While a somewhat different standard of scrutiny is imposed under the Equal Protection Clause than under Title VII, the objective of both is the same, the eradication of racial discrimination.[24] Moreover, the same reason advanced in *Johnson* for not requiring evidence of past discrimination, was advanced in *Wygant* as well by Justice O'Connor;[25] in *Bakke* by Justices Brennan, White, Marshall, and Blackmun;[26]

(1975); *United States v. Wood Wire & Metal Lathers Int'l. Union, Local Union No. 46*, 471 F.2d 408 (2nd Cir.), *cert. denied*, 412 U.S. 939 (1973). See also, *Katzenbach v. Morgan, supra*, Larson, *Race Consciousness in Employment After Bakke*, 14 Harv. C.R.-C.L.L. Rev. 215, 235 (1979); Comment, *Reverse Discrimination: The Supreme Court Defines a Significant Limitation on the Permissible use of Race in Affirmative Action*, 26 Washburn L.J. 618, 622 (1987).

[24] Justice Scalia, in *Johnson* joined by Chief Justice Burger and Justice White, acknowledged this point when he said that: "it is most unlikely that Title VII was intended to place a *lesser* restraint on discrimination by public actors than is established by the Constitution." 107 S. Ct. at 1442 (Scalia, J., dissenting) (emphasis in original). Justice O'Connor in *Johnson* also acknowledged that "the proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal Protection Clause." *Id.*, at 1461 (O'Connor, J., concurring). And, in *Paradise, supra*, 107 S. Ct. at 1075 n.1, Justice Powell implied that the standards of analysis in Title VII and equal protection cases are similar, though not identical.

[25] See, *supra*, note 14.

[26] *Bakke, supra*, 438 U.S. at 364 (opinion of Brennan, White, Marshall, and Blackmun, J.J.) ". . . the requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial action . . . would severely undermine efforts to achieve voluntary compliance with the requirements of law").

and finally in *Weber* by Justice Blackmun.[27] Both *Fullilove* and *Johnson* clearly established that neither a public nor private entity need admit its guilt or participation in discrimination as a predicate to establishing race conscious remedies. This Court realized that to establish such requirements would have a chilling effect on achieving the purposes of the Equal Protection Clause and Title VII. To the extent that findings are required, *Fullilove* only required that there be a relationship between the remedy and the discrimination being cured, and that the discrimination being cured be more than societal discrimination. Despite this Court recognizing the problems inherent in admitting past discrimination, the court of appeals failed to recognize these concerns.

In fact, while the court below seemed to implicitly acknowledge Justice O'Connor's concerns in *Wygant*, about the inherent problems presented by the findings requirement, it disregarded those concerns and instead placed heavy reliance on the following language of the plurality opinion:

> This Court has never held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination. *Wygant, supra*, 106 S. Ct. at 1847 (plurality opinion).

In relying on this language the court below totally misapplied the intent of *Wygant*. In *Wygant* a plurality of this Court held that societal discrimination alone was insufficient to justify race conscious remedies. *Id.*, at 1847-48. The court of appeals, after examining how

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[27] *Weber, supra*, 443 U.S. at 210 (Blackmun, J., concurring) (". . . voluntary compliance with Title VII . . . [places an employer] . . . in profound jeopardy . . . [in which the only way to protect themselves is] . . . to eschew all forms of voluntary affirmative action").

the Richmond City Council conducted its findings, concluded that societal discrimination was the only basis for enacting the Richmond Plan. The court below reached this conclusion despite the Richmond City Council having held a hearing, heard testimony, and drawn on its own experience [28] and that of Congress,[29] to reach its findings. The cumulative result of these findings revealed the existence of purposeful discrimination within the construction industry, and the City of Richmond's passive participation in such discrimination by its awarding of

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[28] As this Court is well aware, the City of Richmond has experienced on numerous occasions the need to eradicate racial barriers within its government and the community at large. *See e.g., City of Richmond v. United States*, 422 U.S. 358 (1975) (this case focused on the city's annexation plan relative to its compliance with the Voting Rights Act); *Bradley v. School Board*, 462 F.2d 1058, 1065 (4th Cir. 1972) (en banc) (this case involved school desegregation, where it was found that the city tended to "perpetuate apartheid of the races"); aff'd by an equally divided Court, 412 U.S. 92 (1973) (per curiam).

[29] In relying on Congress' findings that: "there was direct evidence . . . that . . . discrimination existed with respect to state and local construction contracting as well . . .", the City Council was drawing upon a wide array of sources to reach its conclusion. The use of other sources of information to supplement a governmental entity's own peculiar findings was recently upheld in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51 (1986). In *City of Renton*, this Court held that a city's "substantial governmental interest" in regulating the time, place, or manner of protected speech may be established by findings and studies generated by other cities, "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." 475 U.S. at 51-51. Further support for such "borrowing" has also begun to gain acceptance from the academic community. See Days, *Fullilove* 96 Yale L. J. 453, 480 (1987) (the author in analyzing the necessity for findings states: "State and local agencies creating set-asides should, for example, be able to rely in part from federal legislative or agency findings and judicial determinations regarding nationwide discrimination against minority business enterprises as predicates for considering the propriety of set-asides in their respective jurisdictions").

construction contracts to that industry.[30] In *Wygant* the Board of Education of Jackson, Michigan made no such findings, particularly of the degree accomplished by the Richmond City Council.

This Court found in *Wygant* that the Jackson Board of Education's race conscious layoff plan was seriously wanting because it relied solely on a role model theory. *Wygant, supra*, 106 S. Ct. at 1848. Implicit in the use of the role model theory was reliance on the raw use of statistics. When these statistics were closely scrutinized by this Court it concluded that there was no additional evidence to show that the disparity between the percentage of minority students and the percentage of minority faculty was the result of prior discrimination by the Board. *Id.*, at 1848 (opinion by Powell, J., joined by Burger, C. J., and Rehnquist, J.); see also, *Id.*, at 1854 (O'Connor, J., concurring in the judgment). In essence, the factual support for the Richmond Plan was far more probative than that revealed in *Wygant*. Thus, the factual predicate established by the Richmond City Council was more than adequate to support the adoption of the Richmond Plan. Indeed, the facts revealed by the Richmond City Council are inapposite to *Wygant*, and therefore rob the court of appeals' decision of any basis for support.

B. The holding below unnecessarily imposes on every legislative body seeking to voluntarily remedy racial discrimination the same fact finding standards as are imposed on judicial and administrative bodies, and therefore strains the balance of powers between the judicial and legislative bodies of government at every level.

While the Fourth Circuit acknowledges that the Richmond City Council should not be held to as rigorous a findings standard as a federal district court, its evalua-

[30] The district court agreed with the City Council's findings, after it had heard all of the facts.

tion of the City Council's findings suggests otherwise.[31] How the court of appeals evaluated the Richmond City Council's findings dramatically illustrates the imposition of judicial standards on a legislative body. This judicial imposition is, beyond question, an encroachment upon the legislative branch and can only lead to severe disruption of the balance of power between the judiciary and legislature. See *Fullilove, supra*, 448 U.S. at 503 (Powell, J., concurring). This is particularly true in the area of race conscious remedies where the coordination of the branches at every level of government is extremely critical. This concern was not lost on Justice Powell in *Fullilove.*

In *Fullilove*, the petitioners contended that the legislative history of the Public Works Employment Act of 1977 ("PWEA") reflected no findings of statutory or constitutional violations. *Id.*, at 502. In response, Justice Powell said:

> Congress is not an adjudicatory body called upon to resolve specific disputes between competing adversaries. Its constitutional role is to be representative rather than impartial, to make policy rather than to apply settled principles of law. The petitioners' contention that this Court should treat the debates on Sec. 103(f)(2) as the complete "record" of congressional decision making underlying that statute is essentially a plea that we treat Congress as if it were a lower federal court. But Congress is not expected to act as though it were duty bound to find facts and make conclusions of law. The creation of national rules for the governance of our society simply does not entail the same concept of record-making that is appropriate to a judicial or administrative proceeding. Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attribute as a legislative body lies in its broader mission to investigate

[31] *Croson, supra*, 822 F.2d at 1359.

> and consider all facts and opinions that may be relevant to the resolution of an issue. *Id.*, at 502-03.

He further states:

> Acceptance of petitioners' argument would force Congress to make specific factual findings with respect to each legislative action. Such a requirement would mark an unprecedented imposition of adjudicatory procedures upon a coordinate branch of Government. Neither the Constitution nor our democratic tradition warrants such a constraint on the legislative process. I therefore conclude that we are not confined in this case to an examination of the legislative history of Sec. 103 (f) (2) alone. Rather, we properly may examine the total contemporary record of congressional action dealing with the problems of racial discrimination against minority business enterprises. *Id.*, at 503.

The significance of Justice Powell's view is that he also recognized the evils in allowing courts to encroach upon the legislative fact finding process. And, while his opinion in *Fullilove* may at first glance appear limited to Congress, upon closer scrutiny it appears to reflect a belief that legislative bodies are more competent than courts in making findings of broad-scale discrimination. The proposition that courts should give deference to legislative findings is not without some basis in precedent.[32]

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[32] See, Comment, *The Constitutionality of Affirmative Action in Public Employment: Judicial Deference to Certain Politically Responsible Bodies, supra* (the thrust of the Comment is that under Justice Powell's analysis of equal protection, courts should defer to findings of discrimination by legislative bodies who are accountable to the electorate, but should scrutinize findings of discrimination by isolated public bodies). Cf. Notes, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 Yale L. J. 1403 (1982) (the Note essentially agrees with the idea of judicial deference to findings of discrimination by Congress, but would apply a stricter standard of scrutiny on state and local governments, respectively, on the theory that the federal government is a better protector of minority rights than lower levels of government). See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 (1981) ("it is not the

Justice Powell's concern for maintaining a balance between the judiciary and the legislative branch was not lost on other members of this Court. Even more important than the respect accorded the legislature by this Court, however, is the constitutional principle of the separation of powers.

The Constitution does not require a legislature to conduct hearings, build a record, and make formal findings when it passes a law. *Perez v. United States*, 402 U.S. 146, 156-157 (1971); *Oregon v. Mitchell*, 400 U.S. 112, 147 (1970) (Douglas, J., concurring in part and dissenting in part); *Katzenbach v. McClung*, 379 U.S. 244, 299 (1964); *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937); *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915) (Holmes, J.). The rule derives from basic separation of powers principles embodied in the Constitution.

This Court has uniformly held that a statute "will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S.

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function of the courts to substitute their evaluation of legislative facts for that of the legislature"). See also, *Id.*, at 468-70. But, see *Id.*, at 478 n.2 (Stevens, J., dissenting). Politically responsible legislative bodies are better suited to correcting broad-scale discrimination than courts for two reasons: First, broad-scale societal discrimination is often not provable according to judicial standards. Second, the number of parties involved in a determination of prior widespread discrimination would impose a strain on court procedures: even a class action lawsuit might be difficult to conduct, and furthermore, a class action would not be proper if individual claims differed widely. See, *Vance v. Bradley*, 440 U.S. 93, 111 (1979); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 425 (1952). See also, *Local 35, IBEW v. City of Hartford*, 625 F.2d 416 (2nd Cir. 1980) (the Sixth Circuit upheld an affirmative action ordinance adopted by the City Council of Hartford, Connecticut). *Cf. Detroit Police Officers' Association v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981) (the court of appeals rejected the district court's failure to accept the findings of minority under-representation by a Board of Police Commissioners).

420, 426 (1961); *James v. Strange*, 407 U.S. 128, 133 (1972). In the absence of any legislative history, both the existence of facts supporting the legislature's judgment and its awareness of those facts will be presumed. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938); *Carmichael*, *supra*, at 509-10. Indeed, even if the resulting statute is constitutionally supportable, and the legislative history or other evidence indicate that Congress may have acted for improper reasons, this Court found it to be constitutionally irrelevant.[33] While this Court has not necessarily adhered to these long standing principles when addressing suspect classifications it has not totally disregarded the rationale underlying the principles. In essence, these cases establish a principle that as long as a legislative body acts within the scope of its constitutional powers it is not the province of this Court to instruct it on the kind of hearings it must hold or the "findings" it must make. As such Amici submits that where race conscious remedial legislation is involved, deference should remain the rule until a party can prove that it has been impermissibly discriminated against by the legislation. In this instant the appellee failed to establish on all levels impermissable discrimination. See, *Wyant*, *supra*, 106 S. Ct. at 1853-54. By placing the initial burden on the legislature, however, the decision below allows for groundless claims to stifle the legislative process, and involves the courts in legislative judgments.

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[33] See, e.g., *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislation. . . . It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it."); *Barenblatt v. United States*, 360 U.S. 109, 132 (1959) ("So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power").

While the judgments of Congress, as opposed to those of a city council or a state legislature, are accorded particular deference, courts do not have carte blanche authority to second-guess state and local legislative judgments. *Vance, supra; Ferguson v. Skrupa*, 372 U.S. 726 (1963) *Day-Brite, supra.* Judicial restraint in the review of state or local statutes or ordinances follows naturally from the realization that courts are not representative bodies. *Alfange, supra*, at 640-41). As Justice Frankfurter noted, courts "are not designed to be a good reflex of a democratic society." *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring). See also, L. Hand, *The Bill of Rights*, 11-18 (1958); A. Bickel, *The Least Dangerous Branch* (1962). In reviewing civil rights legislation, this Court has often recognized the competence of state or local governments to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures. *Johnson, supra; Paradise, supra; Bakke, supra* at 302 n.41 (Powell, J.); *Katzenbach v. Morgan, supra*, at 648-653; *South Carolina v. Katzenbach, supra*, at 325-27; and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

Respect for the democratic process and the separation of powers is not the only reason courts do not require legislatures to hold hearings or make detailed findings:

> The principle [of separation of power] is not merely one of deference to Congress or the states. It rests upon appreciation of the fact that the fundamental basis for legislative action is the knowledge, experience, and judgment of the people's representatives only a small part, or even none, of which may come from the hearings and reports of committees or debates upon the floor. Cox, *The Supreme Court, 1965 Term-Forward: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91, 105 (1966).

Legislatures are not courts. Courts develop law through reason derived from precedent. They are a reactive body, deciding only those cases and controversies before them on the basis of a record generally supplied by the parties. Legislatures, by contrast, create laws through a process of bargaining and compromise. They are by their very nature a diverse body whose task it is to make laws that may not please members of the judiciary or the public, but stand nonetheless as expressions of the will of the electorate. A legislature acts affirmatively, drawing information and ideas not merely from hearings, debates, and committee reports but also from constituents, interest groups, and the executive branch. Fisher, *Constitutional Interpretation By Members of Congress*, 63 N.C.L. Rev. 707 (1985). "In the nature of the case [a legislature] cannot record a complete catalog of the considerations which move its members to enact laws." *Carmichael, supra*, at 301 U.S. at 510.

Lumping legislative determinations with administrative and judicial findings is therefore inappropriate. Legislative bodies cannot be expected to conduct themselves like courts because they were not created to function as such. *Fullilove, supra*, 448 U.S. at 503 (Powell, J., concurring). Imposing judicial formalities upon legislatures will not insure the integrity of legislation. Requiring a state or local government to produce detailed findings prior to enacting legislation could only result in undesired consequences. Amici believe that one of the side-effects of the court of appeals' decision is that it will force legislatures to focus attention and financial resources on the preparation of legislative findings, rather than more careful consideration of the text of pending legislation. Such detailed findings can only lead to more involvement of the courts in trying to ascertain the genuineness of the legislation.

Justice Powell concluded in *Fullilove*, that requiring Congress to make more specific findings would put an unwarranted "constraint on the legislative process." *Id.*, at 503. This Court and various scholars have on numerous occasions recognized the need for maintaining a balance between the judicial and legislative branches. Karst, *Legislative Facts in Constitutional Litigation*, Supreme Court Review 75 (1960). This respect for separation of powers principles and concern for burdening the legislative process was entirely lost on the court of appeals.

CONCLUSION

For the several reasons presented above, the judgment below must be reversed.

Respectfully submitted,

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